No. 259. A.D.
Brf. of Wetmore & Johnson for
MAR 17 1899
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

Filed Mar. 17, 1899.

JAMES M. SIGAFUS,
Plaintiff in Error,
vs.
DUDLEY PORTER ET AL.,
Defendants in Error.

No. 259.

Brief of Plaintiff in Error

upon question certified by the Circuit Court of Appeals for the Second Circuit.

EDMUND WETMORE,
HENRY B. JOHNSON,
Counsel for Plaintiff in Error.

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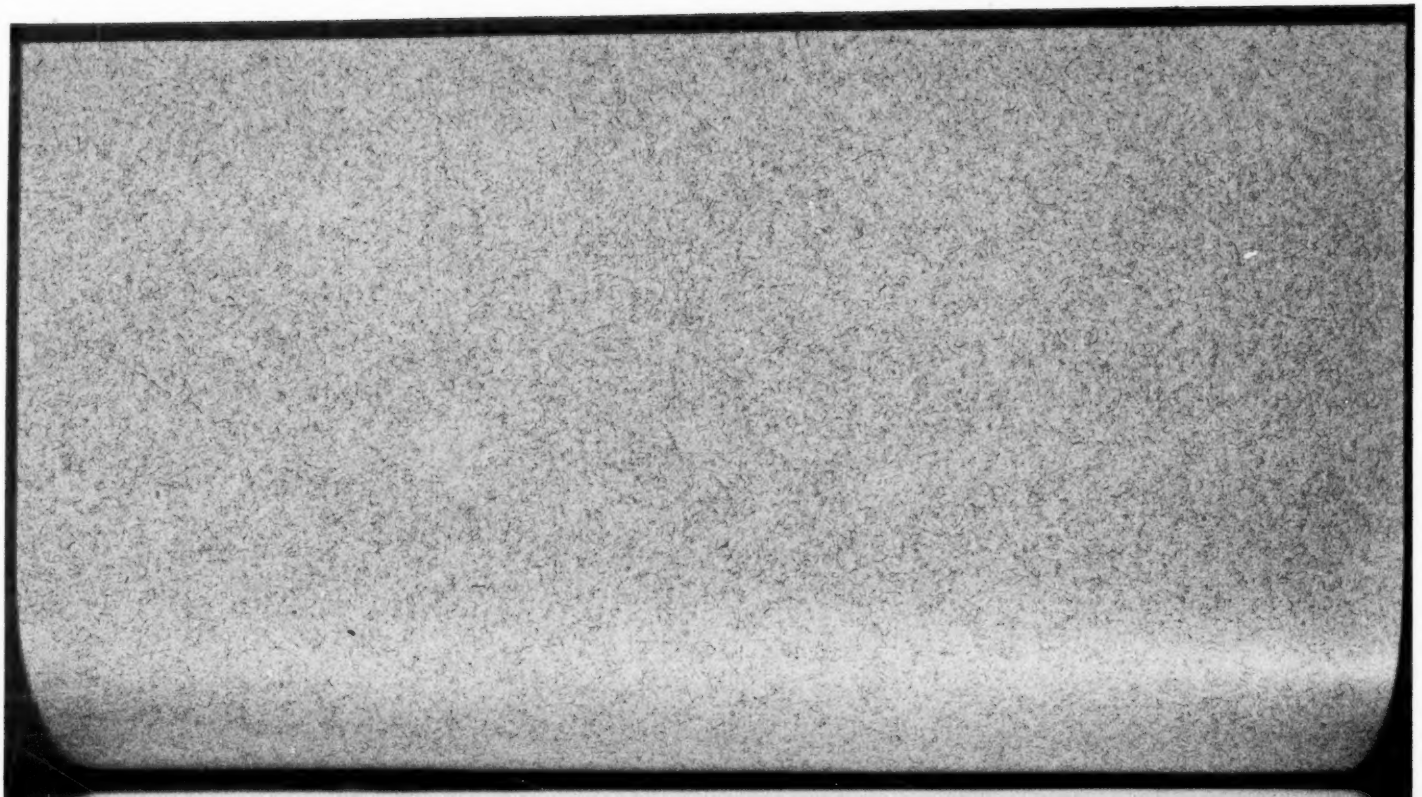

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UNITED STATES SUPREME COURT.

JAMES M. SIGAFUS,
Plaintiff in Error,

AGAINST

DUDLEY PORTER, ET AL.,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR

upon question certified from the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE.

This was an action by defendants in error, Dudley Porter and others, plaintiffs below, against the plaintiff in error, James M. Sigafus, defendant below, to recover damages for deceit in inducing the defendants in error to purchase a gold mine.

The cause came before the Circuit Court of Appeals for the Second Circuit upon a writ of error to review a judgment in favor of the defendants in error. Two of the assignments of error related to the rule as to the measure of damages, and the question certified to this Court is for the purpose of obtaining the instruction of this Court as to the proper measure of damages in this case.

The action was one in tort for deceit or false representation simply, and contained no element of warranty.

The subject of the alleged deceit was a gold mine. The result of it, the inducing of defendants in error to purchase the gold mine.

The false representations complained of, and found by the jury upon the evidence submitted to it, had respect to the past history of the mine, its condition at the time of the sale, and its estimated value.

The value of the property by its very nature was speculative and uncertain.

For the purpose of enabling the jury to measure the damages the opinion of expert witnesses was submitted as evidence of what would have been the value of the mine had it been such as it was represented to be —*i. e.*, if its history or past production, and its condition at the time of the sale, and the estimated value of the rock that had not been worked, had been such as defendants in error believed, relying upon the representations and devices of plaintiff in error.

In other words, the evidence submitted to the jury upon this point had respect to what—assuming that the representations were false—a gold mine that did not exist, except in the imagination, was worth as a speculation.

There was no conflict as to what was paid for it and laid out upon it by the plaintiffs below in order to develop it, and there was evidence as to what it was actually worth at the time of the purchase.

QUESTION CERTIFIED.

What is the proper measure of damages to be applied in assessing plaintiffs' recovery. Is it

(a) The difference between the value of the property as it proved to be and as it would have been as represented ; or

(b) The money plaintiffs had paid for the mine, with interest and any other outlay legitimately attributable to defendant's fraudulent conduct, less the actual value of the mine when plaintiffs bought it ?

ARGUMENT.

I.

Fundamental Principles.

We submit that the following are fundamental principles as to the measure of damages for false representations :

1. The damage to be recovered must always be the natural and proximate consequence of the act complained of.

Greenl., Vol. II., Sec. 256.
Smith vs. Bolles, 132 U. S., 130.

This is stated in Bushman and Cooke vs. Codd (53 Md., 202), as " Plaintiff is entitled to recover such damages as are the natural and necessary result of the false representations."

2. Damages which are uncertain, contingent or speculative, are not recoverable.

" Damages are not recoverable for the loss of purely speculative benefits that can be estimated by no certain standard."

Fitzsimmons vs. Chapman, 37 Mich., 139.

" The probable or possible benefits of a voyage as yet *in fieri*, can never afford a safe rule by which to estimate damages in cases of marine trespass. There is so much uncertainty in the rule itself, so many contingencies which may vary or extinguish its applica-

tion, and so many difficulties in sustaining its legal correctness, that the Court cannot believe it proper to entertain it."

The Annable Nancy, 3 Wheat., 546.
La Armistad de Rues, 5 Wheat., 385.

"But these cases (*i. e.*, trespass), where damages are claimed, not on the ground that they were or should have been foreseen, but simply as the direct result of the breach, are subject to the limitation of the rule which requires such damages to be certain and direct."

Bowas vs. Pioneer T. Line, 2 Saw., 30.
Smith *et al.* vs. Condry, 1 How., 24.

In an action for deceit in the sale of mining stock, the Court says :

"His damages should equal the loss which the deceit inflicted. The loss in the transaction before us is the difference between the real value of the stock and the fictitious value at which the buyer was induced to purchase.

"His actual loss does not include the extravagant dreams which proved illusory, but the money he has parted with without receiving an equivalent therefor."

High vs. Berret, 148 Pa. S., 261.

Upon this point, also,

Fitzsimmons vs. Chapman, 37 Mich., 139.

II.

The determination, therefore, as to how damages in this particular case are to be measured, apparently turns upon the point as to what are the natural and proximate damages, or the natural and necessary damages, eliminating such as are uncertain, contingent or speculative.

In the certified question, the Circuit Court of Appeals asks which of two alternative rules is to be applied to this case. The first of the alternatives is, are plaintiffs' damages in this case the difference between the value of the property as it proved to be and as it would have been as represented.

There will be no controversy, we apprehend, that the value of the property as it proved to be is one of the elements in measuring the damage. From what sum or value, then, is the actual value of the property to be subtracted in determining the natural and necessary or proximate damage, with the degree of certainty required by the second rule?

Is it to be subtracted from the price paid and other outlay legitimately attributable to defendant's fraudulent conduct—in other words, all that the purchasers were deprived of, or is to be subtracted from what is denominated in the question "the value of the property as it would have been as represented."

There can be no question that the money paid, with interest, and any other outlay legitimately attributable to defendant's conduct, less its actual value when bought, is a proximate, necessary and certain damage, resulting from the false representation. The real question is, therefore, can plaintiffs recover a further sum as damage, provided the value of the property as it would have been as represented exceeded the price paid?

This raises the inquiry whether such further sum represents any portion of the proximate damage to plaintiffs; and second, what sort of value as to certainty could be predicated upon the representations claimed to have been made in this case.

Upon this point we submit that the statement of facts is insufficient, and that it is desirable for its proper determination that there should be before the Court a more particular statement of the nature of the representations, of the facts as to the character and condition of the property, and the examination of it

by the purchasers, and as to the testimony or estimate of value predicated upon the alleged representations.

Assuming, however, that the statement of facts is sufficient, we submit, with respect to this inquiry:

FIRST. Plaintiffs claim that they were fraudulently induced to purchase, and that they relied upon the false statements and purchased and paid a certain sum of money for the property and a certain sum to develop it, and, retaining the property, sue for their damage.

What did they lose? And how were they damaged?

The proximate and necessary result of the deceit was the purchase and payment and the expenditure afterwards legitimately attributable to it. They could not have lost what they hoped to make, because they never had it to lose.

SECOND. What sort of value other than the agreed price between the parties could be predicated upon the representations claimed to have been made?

The value of property may be either its market value or its utility or intrinsic value. By its very nature a gold mine is a speculative venture and not an article of ordinary merchandise, and has, therefore, no market value as grain, cotton, horses or farm land or city lots are said to have a market value. The value of a gold mine other than that stipulated in an agreement can be only what the mine will prove to produce or be worth for working.

The character of the mine, and its intrinsic value, depend, for one factor, upon the contents of the rock hidden behind the faces of the openings into it. Behind these faces the senses of man cannot go; and it cannot be assumed that what threads of gold, what nuggets, and what barren rock these faces may hide, can be determined with any reasonable certainty from representations as to the history of the mine, and its condition—*i. e.*, as to what gold has been taken from the rock removed in making the openings, and the

present dimensions, and appearance of the faces of the openings.

The recovery, therefore, by the plainfiffs of a sum far in excess of the entire purchase price of the property, and all outlays upon it by them cannot, be assumed to be other than the recovery of a certain portion of the hoped-for profits of an unrealized speculation.

This Court has, we submit, in a substantially similar case, fixed the application of these fundamental principles as to the measure of damages to such cases. We refer to the case of *Smith vs. Bolles*, 132 U. S., 125.

The action was an action for deceit brought by the plaintiff to recover damages for alleged fraudulent representations in the sale of shares of mining stock. The misrepresentations consisted in false and fraudulent statements by the defendant respecting a variety of facts existing in respect to a certain silver mine which was the basis of the company formed to purchase it, and the shares in which were bought by the plaintiff in reliance upon said representations. Plaintiff then alleged that the stock and mining property were wholly worthless, and that, had the same been as represented by the defendant, the stock would have been worth at least ten dollars per share. The price which the plaintiff paid was a dollar and a half a share. The complaint contained other counts of other stockholders who had been defrauded in like manner, and who had assigned their claims to the plaintiff. The damages claimed were sixty thousand five hundred dollars, which was the value of the property if it had been as represented.

Two of the assigned causes of action founded on the claims of Bolles and Manchester originally sought merely a rescission of the contracts, and to recover back the money they had respectively paid; but, by amendment, "their causes of action were changed to counts for the recovery of damages rasulting to the said Bolles and Manchester from the alleged false and fraudulent representations."

It will thus be seen that the case was purely an action for deceit for fraudulent representations, the damages claimed being the value of the property as represented over its actual value, which was said to be nothing.

The Court on the trial charged the jury that "the measure of recovery is generally the difference between the contract price and the reasonable market value if the property had been as represented to be, or, in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant and as may be shown in the evidence before you."

Upon this the Supreme Court held as follows (italics ours):

"In this there was error. The measure of damages was *not* the difference between the contract price and the reasonable market market value if the property *had been as represented to be*, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it *would have had* if the property had been *equal to the representations*. What the plaintiff might have *gained* is not the question, but what he had *lost* by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been make in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent

conduct; but this liability did *not* include the expected fruits of an unrealized speculation. *The reasonable market value, if the property had been as represented*, afforded, therefore, *no proper element of recovery.*"

In England the question was discussed in the High Court of Chancery, and the rule in Smith vs. Bolles adopted, in the case of

Peek vs. Derrick, L. R. Chan. Div., 541, 591–4.

The action in that case was for deceit. The directors for a proposed new tramway company running out of Plymouth set forth a prospectus saying that they had a right to run the road by steam or mechanical power and were not confined to horse power. Plaintiff Peek testified that he was well acquainted with the traffic that might be expected on the road, "and, having this steam power, it made, as I said be- "fore, two per cent. difference. In case of our making "four per cent., it would be six per cent." He also testified that he made his investment and paid four thousand pounds for stock in the company in reliance upon the statement that the company might use steam power. It seems that this statement was untrue in point of fact. The company had not received the grant, and were not able to obtain the grant to use steam power, and the speculation proved a failure. The rule of damages was discussed and opinions given on the appeal by Lords COTTON and LOPES, the Lord Justice of the Court of Appeals, as well as by Sir JAMES HANNEN. Lord COTTON said, after a review of the cases, that the intrinsic and not the market value of the property at the time of the fraudulent sale is to be taken in measuring damages, and that the damage was the price paid less the actual value of the thing bought.

Lord LOPES expressed himself as follows: "The question in this case is: What is the loss which the plaintiff has sustained by acting on the mere representation of the defendants, and what is the true meas-

ure of his damage? In my opinion it is the difference between the £4,000 he paid and the real value of the shares after they were allotted."

In the latest edition of Sedgwick on Damages the rule of Smith vs. Bolles is commented on as follows:

"The *ratio dicendi* of this case would seem to be "that the action is brought not upon the contract of "warranty, but for a tort. Compensation is asked for "loss caused by the defendant's *false statements;* and "to determine its amount the question should be, What "greater amount of property would the plaintiff have if "the defendant's statements had not been made? The "plaintiff's loss is not the value of his bargain; for it "is necessary to the very maintenance of the action to "show that the bargain would not have been made if "the defendant had not made the false statements "complained of. If these had not been made, there-"fore, the plaintiff would have the consideration he "paid, but nothing more" (Note. This is incorrect, for the plaintiff may have expended more than the consideration as the direct result of the fraud), "and "the difference between that consideration" (plus such incidental or additional expenditures, if any) "and the actual value of the property represents all "the loss that was caused by the defendant's tort."

Sedgwick on Dam., 8th Ed., Sec. 778, p. 498.

The case of Smith v. Bolles attracted immediate attention, and it has not been questioned, limited or overruled, but has been followed repeatedly in the Feberal Courts.

In the Eighth Circuit Judge SHIRAS applied the rule in the case of an action brought to recover damages alleged to have been caused the plaintiff by certain misrepresentations touching the character and value of 1,600 acres of pine lands conveyed by the defendant to plaintiff.

Atwater vs. Whiteman, 41 Fed. Rep., 427.

It was also followed in the case of Glaspell vs. Northern Pacific Railway Co., 43 Fed. Rep., 900. This was an action to recover damages for deceit in the sale of land. The misrepresentations were made by the agents of the railroad company, were false and fraudulent, and it was proved that the lands were not as represented. The bill of exceptions states that the Court charged the jury as to the measure of damages that "if they found for the plaintiff it must be in a "sum equal to the difference between the actual value "of the land and the value of the lands as they "would have been if they had been as repre-"sented at the time of the sale." In commenting upon this Judge THOMAS says: "Did "the Court give to the jury the correct rule for "the measurement of damages as applicable to the "facts of this case? The action is for the recovery of "damages resulting to plaintiff from alleged false and "fraudulent representations. The lands were wild "and uncultivated, and at the time of the sale there were "only a few settlers, if any, in the vicinity where this "land was situated. In an action to recover damages "which the plaintiff had suffered by reason of the pur-"chase of stock in a corporation, which he was in-"duced to purchase on the faith of false and fraudu-"lent representations made to him by the defendant, "the Supreme Court of the United States, in Smith vs. "Bolles, 132 U. S., 125; 10 Sup. Ct. Rep., 39, held "that the measure of damages is the loss which the "plaintiff sustained by reason of such representations "such as the amount which he paid out in interest, "and all outlays legitimately attributable to the de-"feudant's fraudulent conduct, but it does not include "the expected fruits of an unrealized speculation. The "rule thus enunciated by the Supreme Court is bind-"ing on this Court if applicable to the facts of this "case. Counsel for the plaintiff contends that the "rule laid down in Smith vs. Bolles, *supra*, applies "only to the purchase of land induced by fraud, and

" refers to Horne vs. Walton (117 Ill., 130, 141; 7 N.
" E. Rep., 100, 103), which is one of the cases cited by
" Chief Justice FULLER in Smith vs. Bolles on page
" 130 of the opinion. In that case the Supreme
" Court of Illinois states that 'where the sale of land
" ' is made by false and fraudulent representations as
" ' to its value, quality or condition, the measure of
" ' damages in any action by the purchaser is the differ-
" ' ence between the actual value of the land and its
" ' value as represented to be at the time of the sale.'
" But that question was not involved in the case, and
" it was unnecessary to give the rule of damages on
" the sale of land induced by fraud. It appears in
" that case that the party procured a loan of $2,000
" through fraud and deceit, upon representation that
" the security was good, the security being land, when,
" as a matter of fact, it was worthless. The Court
" held that the actual loss to the party was the amount
" he had borrowed, with interest thereon, while he was
" kept out of the possession of it. The Court say, on
" page 135 of the opinion: 'We think the true
" ' measure of damages in this case was the amount of
" ' such loss; to wit, $2,000 and interest.' In the
" opinion in Smith vs. Bolles is cited also the case of
" Crater vs. Binninger, 33 N. J. Law, 513, and it will
" be found in that case that the New Jersey Court laid
" down an entirely different rule as to the measure of
" damages on the sale of lands induced by fraud.
" Courts have sometimes made a distinction as to the
" rule of damages in the sale of personal property and
" real property when effected or induced by fraud and
" false representations, but the Supreme Court of the
" United States, in Smith vs. Bolles, seem to have laid
" down a rule applicable to the measure of damages in
" the sale of both classes of property coming within
" the line of facts applicable to that case. Judge
" SHIRAS has applied this rule in the case of the sale of
" line lands, induced by false and fraudulent rep-
" resentations (Atwater vs. Whiteman, 41 Fed. Rep.,

"427). The statute of this State (Section 1967), which "was in force also in the Territory of Dakota at the "time of the trial of this action, and for a long time "prior thereto, is declaratory of the common law rule "as to the measure of damages as announciated, "explained and applied in Smith vs. Bolles. It reads "as follows:

"'For a breach of an obligation not arising from "'contract, the measure of damages, except where "'otherwise expressly provided by this Code, is the "'amount which will compensate for all the detriment "'proximately caused thereby, whether it could have "'been anticipated or not.'

"The latter part of the section 'whether it could "'have been anticipated or not' is new, but as there "is no question of remote damages in this case it is "not necessary to attempt to define the meaning of "these words. The balance of the section, as I have "stated, is declaratory of the common law (Fairbanks "vs. Williams, 58 Cal., 241, 242; 2 Greenl. Ev., Sec. "256; Walrath vs. Redfield, 11 Barb., 368-371). Upon "this statute and the cases of Smith vs. Bolles and "Atwater vs. Whiteman, *supra*, I am of the opinion "that the Court, upon the trial of this action, should "have instructed the jury that if they found for the "plaintiff upon the other issues that as to the measure "of damages they should find the cash value of the "land in the condition it actually was at the time of "the sale, and deduct such value from the sum of "money invested by the plaintiff in the land, and that "difference, with interest added, in the discretion of the "jury, would be the proper amount which the plaint-"iff was entitled to recover. It follows that the in-"struction given by the Court as to the measure of "damages was erroneous, for which error a new trial "must be granted, unless it appears that the error was "harmless, and worked no injury to the defendant."

It will be observed that the statute of North Dakota, which was referred to, is only deemed to be declaratory of the common law.

It was also followed in the Normannia, 62 Federal R., 469 (1894) District Court, S. D. New York, BROWN District Judge:

The above libel was filed against the steamship "Normannia" *in rem*, and against the Hamburg-American Packet Company, her owner, *in personam*. The libel alleges *false representations* made to the libellant by the company's agents in London, just prior to his embarkation on the "Normannia" on August 27, 1892, and at the time of the outbreak of cholera at Hamburg; that the libellant, who had previously bought a first-class cabin ticket for passage by the "Normannia" from Southampton to New York, but who desired to surrender it in case she carried steerage passengers, through fear of contagion and quarantine, was induced to take passage on the "Normannia" at Southampton, on August 27th, on the agent's assurance that no steerage passengers were on board; whereas, in fact she had 500 steerage passengers, who had embarked at Hamburg on the 25th; that in consequence of the presence of the steerage passengers, and of the outbreak of cholera among them, the libellant was detained at quarantine 13 days, and subjected to much suffering, sickness and subsequent loss of time, for which suitable damages are claimed." * * *

(P. 481). *To recover damages for a tort they must be proximately and naturally connected with and flow from it;* they must be such as might be within the contemplation of the parties as a *natural consequence* of the wrongful act, as distinguished from a merely accidental result (Smith vs. Bolles, 132 U. S.) * * *

"Excluding, therefore, such elements of damage as are not properly attributable to the presence of steerage passengers, I think $500 will be a proper compensation for the libellant's loss of time, and for his suffering, so far as legally recognizable. From this sum is to be *further deducted the price of a return* ticket, say $100, which would have been lost if the libellant had not returned upon the "Normania," since

he evidently would have had no legal claim upon the company for its return. There remains $400, for which a decree may be entered in favor of the libellant, with costs."

It was also followed in Wilson vs. New United States Cattle-Ranch Co., 73 Federal R., 994 (1896, Circuit Court of Appeals, Eighth Circuit). The N. Co. entered into a written contract with W. for the purchaes of a cattle ranch and 6,000 head of cattle for about $300,000 and some stock in the corporation, such contract containing various covenants and warranties as to the number and description of the cattle and other matters, and mortgages being given on the land and cattle to secure the purchase money. W. afterwards entered on the ranch, took possession of the cattle and sold them under the chattel mortgage.

Thereupon the N. Co. brought an action against W., alleging that W., by *fradulent misrepresentations*, induced it to make the contract and pay the portion of the purchase price which it had paid.

Sanborn, J. (p. 997): "When a vendee ascertains that he has been induced to make a contract of purchase by the fradulent misrepresentations of his vendor, he has a choice of remedies. * * * Upon an action for damages for the deceit and fraud which induced the purchase, *the measure of damages is what the vendee has lost. It is the difference between that which he had before and that which he had after the contract of purchase was made* (Smith vs. Bolles, 132 U. S., 125, 10 Sup. Ct 39; Reynolds vs. Franklin, 44 Minn., 30.)"

It was also followed in Rockefeller vs. Merritt, 76 Fed. Rep., 909 (1896), Circuit Court of Appeals, Eighth Circuit, SANBORN, J. (at p. 914): "Upon this record the plaintiff was induced by the *false representations* of the defendant to take stock in the new corporation to the amount of $2,967,632, and to part with stocks in his original corporations which, at the rates specified in his contract, were worth 50 per cent. of the amount

of this new stock, or $1,483,816. The stock he received in the Consolidated Mines was actually worth but 10 per cent. of its par value, or $296,763.20. The defendant offered and was refused permission to prove that the actual value of the stocks which the plaintiff gave for his stock in the Consolidated Mines was no greater than the value of the stock he received; namely, $296,763.20. For the purpose of this discussion the statement contained in this offer must now be deemed to be the fact (Scotland Co. vs. Hill, 112 U. S., 183-186). Under this state of facts the effect of the rulings of the Court below upon the question of damages was that, if the jury found the deceit to be proved, as they did, the plaintiff was entitled to recover the difference between the value of his original stocks at the rates specified in the contract, $1,483,816, and the actual value of the stock of the Consolidated Mines which he received, $296,763.20, or $1,186,042.80, notwithstanding the fact that the actual market value of the plaintiff's original stocks was never more than the actual value of the stock in the new corporation which he received for them. Their effect was to permit the plaintiff to recover of the defendant as damages, if the jury saw fit to allow as much, *four times* the actual market value of all the property he had parted with, because, in an agreement for the exchange of stocks, the parties had stated its value for the purposes of the exchange at five times its actual value. Can these rulings be sustained?

The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase or exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract. It is the loss which he has sustained, and not the profits which he might have made by the transaction. It excludes all speculation, and is limited to compensation (Smith vs. Bolles, 132 U. S., 125; Busterud vs. Farrington, 36 Minn., 320; Reynolds vs.

Franklin, 44 Minn., 30, 32; Stickney vs. Jordan, 47 Minn., 262; Fixen vs. Blake, 47 Minn., 540, 542; Wallace vs. Hallowell, 56 Minn., 501; Woolenslagle vs. Runals, 76 Mich., 545; McAleer vs. Horsey, 35 Md., 439; Bushman vs. Codd, 52 Md., 202; High vs. Berret (Pa. Sup.), 23 Atl., 1004). These propositions are unquestioned, and counsel for the plaintiff insist that they were properly applied to measure the damages in this case. They maintain that the plaintiff and the defendant agreed by the contract of August 28, 1893, that the actual value of the plaintiff's original stock was an amount of money which was equal to 50 per cent. of the par value of the new stock which he received, or to $1,483,816, and that the defendant is thereby estopped from proving any other value for them in this action. * * * The evidence convinces us that their minds never considered or met upon the question of the actual *market value* of any of these securities, and that they never intended to and never did make any binding agreement upon that subject. The defendant, therefore, did not contract that the market value of the plaintiff's stocks was $1,483,816 in cash, or in anything but the stock of the consolidated mines at 50 per cent. of its par value."

The same rule has been applied in the following cases among others in the several State Courts:

Woolenslagle vs. Runals, 76 Mich., 545.
Greenwood vs. Pierce, 58 Tex., 130.
Matlock vs. Reppy, 47 Ark., 148.
Reynolds vs. Franklin, 44 Minn., 30.
Alden vs. Wright (Minn.), 49 N. W. R., 767.
Craber vs. Benninger, 33 N. J. L., 513.
Hallam vs. Tod Hunter, 24 Iowa, 166.
Hiner vs. Richter, 51 Ills., 299.
Kennedy vs. O'Connor, 35 Ga., 193.
Markel vs. Mundy, 11 Neb., 213.
Howes vs. Axtell, 74 Iowa, 208.

There are, however, other cases in which the Court, in applying these fundamental principles to particular facts, has said that the plaintiff is entitled to recover

the difference between the actual value and the value which the property would have had if it had been as represented.

But we believe that in substantially all such cases the property misrepresented and the character of the misrepresentation was such that it could be said with certainty what such value would have been, and that property of a certain known or agreed value was contemplated by both the person making the misrepresentation and the person relying upon it.

Whether such an application of these principles to such cases be the true rule, where the element of certainly as to the value of the thing represented is present, there can be no doubt that where the thing represented is wholly imaginary and its value speculative and uncertain, it is unsound and without authority in law or basis in reason.

If the views here presented are sound it is submitted that the question certified should be answered. The proper measure of damages to be applied in assessing plaintiffs' damages is the money plaintiffs had paid for the mine and any other outlay legitimately attributable to defendant's fraudulent conduct, less the actual value of the mine when plaintiffs bought it.

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